United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

76-1335

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P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

PETER VARIANO, et al,

Defendant-Appellant.

PETITION FOR REHEARING ON
BEHALF OF APPELLANT PETER
VARIANO WITH SUGGESTION
FOR EN BANC CONSIDERATION

IRVING ANOLIK
Attorney for Defendant-Appellant Variano
225 Broadway
New York, New York 10007
(212) 732-3050

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No. 76-1355

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TO THE HONORABLE MOORE, ANDERSON, AND FEINBERG,
Circuit Judges:

Defendant-appellant VARIANO respectfully prays that this Court grant a rehearing with respect to its decision and opinion rendered the 14th day of March, 1977, wherein this Panel affirmed the judgment of the United States District Court for the Southern District of New York (Carter, D.J.), convicting VARIANO and several other defendants of violating 18 U.S.C. §1955.

We are also suggesting that this case be submitted to all of the active Judges of this Circuit for en banc consideration because of the important issues presented herein.

HISTORICAL BACKGROUND

On account of the page limitations on a petition for rehearing, we incorporate by reference the facts set forth in our original briefs, and also the legal arguments contained therein, as if fully set forth herein.

REASONS FOR GRANTING A REHEARING

In its opinion, this Panel of the Court failed to cope with certain important points raised in the original briefs and arguments, which we feel and submit this Court should have dealt with.

1. This Court held, in effect, that despite the fact that Judge Carter had dismissed the conspiracy, that nevertheless it was proper to have submitted the question under 18 U.S.C. 1955 to the veniremen. At Slip 2301 of the opinion, this Panel stated that Judge Carter had named two groups of five persons which "the evidence linked to one another: Variano, Colletti, Bucci, Russillo and Millow; and Picciano, Ostrander, Monaco, Evangelista and Murty."

Aside from the fact that this Court apparently overlooked the fact that Judge Carter never marshalled the evidence, we submit that there was absolutely no way the jury could determine which "five persons" were supposed to be linked to VARIANO.

It is therefore patent that the jurors, if they decided that five persons had been involved with VARIANO to satisfy the requirements of 18 U.S.C. 1955, may very well have failed to agree unanimously on which five persons they actually were. If this were the case, there would have been a defective verdict.

In UNITED STATES v. NATELLI, 527 F.2d 311, (2 Cir., 1975), cert. den. __U.S.__, this Court held that where a jury may have decided an issue which was predicated upon insufficiently proved charges, then there is a failure of proof altogether.

More important, however, the Court of Appeals in NATELLI, 527 F.2d at 328, 329, ruled that where specifications in a single count relate to two distinct fact patterns rather than merely being an

alternate way of charging a violation of the same statute, then unless both ways necessarily support the conviction, the conviction cannot stand.

We submit that this Panel's holding necessarily indicates that unless the five persons needed for a violation of 18 U.S.C. 1955 were involved with VARIANO, that no conviction could stand.

Since there were two separate groups of five persons allegedly mentioned by the Judge, but no marshalling of the evidence, it is obvious that the jurors might very well have failed to apply a proper standard in arriving at a verdict.

In other words, unless the same five persons were used by all of the jurors in arriving at their verdict, the verdict would have been defective because it would not have been unanimous.

Time and again this Court has reversed convictions for failure to define adequately the legal principles involved,

particularly where people are allegedly acting in some joint enterprise (UNITED STATES v. TERRELL, 474 F.2d 872 (2 Cir., 1973); UNITED STATES v. BYRD, 352 F.2d 570 (2 Cir., 1965); UNITED STATES v. GARGUILO, 310 F.2d 249 (2 Cir., 1962).) See, also, UNITED STATES v. BRYANT, 461 F.2d 912 (6th Cir., 1972).

Where a jury may have convicted on an unproved specification, a new trial should be granted, as held in YATES v. UNITED STATES, 354 U.S. 298, 312 (1957), where the Court stated:

> "We think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is important to tell which ground the jury selected."

See, also, STROMBERG v. CALIFORNIA, 283 U.S. 359, 367-68 (1930); and, STREET v. NEW YORK, 394 U.S. 576, 585-86 (1969).

This principle has not been limited to cases involving constitutionally invalid statutes, as the Government had suggested in its unsuccessful

argument in UNITED STATES v. NATELLI, supra*.

In UNITED STATES v. GUTERMA, 281 F.2d 742, 747 (2 Cir., 1960), this Court reasoned:

> "The two prosecutions were submitted to the jury together and we cannot know whether their verdict was based solely on the UFITEC transaction or in part or solely on the Judson Commercial sale."

See, also, UNITED N.Y. & N.J. SANDY HOOK PILOTS ASSN. v. HALECKI, 358 U.S. 613, 619 (1959), and UNITED STATES v. DRISCOLL, 449 F.2d 894, 898 (1st Cir., 1971).

2. This Court did not consider the fact that there was no evidence whatsoever linking appellant VARIANO with the five persons allegedly mentioned by Judge Carter.

Angela David, alone, was the main witness against VARIANO, and she certainly did not link VARIANO with Colletti or Russillo. As a matter of fact, Colletti was acquitted, as was Ostrander.

*See pages 7 and 8 of Government's Petition for Rehearing in NATELLI. In VITELLO v. UNITED STATES, 425 F.2d 416, 419 (9th Cir., 1970), the Court explained that "The teaching of [Yates] should be here applied if we find...that there was insufficient evidence to be submitted to the jury on any one or more of the specifications of falsity...".

Where insufficiency of evidence is involved, as is the case herein, this Court should reverse. (ANDERSON v. UNITED STATES, 417 U.S. 211).

In NATELLI, supra, this Court recognized that even without a specific reference to the insufficiency of evidence, this Court can consider a "sufficiency of the evidence claim" (UNITED STATES v. NATELLI, 527 F.2d at 329, 330).

3. This Court, for some unexplained reason, did not even mention the fact that several pages of the minutes of trial were not preserved and, so far as we know, were never presented to this Court. No one can assume that nothing prejudicial occurred during the time encompassed by those missing minutes.

4. As we have indicated previously, the Court below failed to marshall evidence and, therefore, the jurors had no way of knowing what was admissible against which defendant, or even what the contentions of the Government were and

those of the defense. Nowhere does Judge Carter explain which "five persons" were applicable to VARIANO.

5. This Court deals, in its opinion of affirmance, with the question of notice with respect to electronic surveillance.

It has totally overlooked the argument of VARIANO in his brief, pages 40 and 41, that the suppression hearing on the electronic surveillance clearly and unmistakably reveals that there was a total failure to minimize and a total failure of the "sealing" requirements of both the state and federal statutes.

We ask this Court to again review the minutes of the suppression hearing where it is obvious that one recording machine was never turned off and where it is also manifest that the sealing requirements of the statute were virtually ignored. (UNITED STATES v. GIGANTE, (2Cir., 1976), 538 F.2d 502;PEOPLE v. SHER, 38 N.Y.2d 600; and, PEOPLE v. NICOLETTI, 35 N.Y.2d 249).

6. The jury was also given a great number of exhibits which had been admitted during the course of the trial which was predicated upon a conspiracy count that was dismissed by Judge Carter prior to the deliberations of the veniremen.

The jurors were not instructed as to which exhibits were admissible against which defendants.

The jurors were not told what the effect of the dismissal of the conspiracy count was, in any adequate manner, since it is obvious that on the substantitve count which remained, guilt was personal and not conspiratorial within the framework of the conspiracy count.

7. This Court stated that Judge Carter found that at least two conspiracies existed.

If this were so, that would make it even more confusing to the jurors

because 18 U.S.C. 1955 is supposedly not a conspiracy section and yet, no adequate explanation was given to the talismen as to which evidence was admissible against which defendants and which exhibits applied to which defendants.

In short, this Court should reconsider all of the seven aspects of error which we have delineated above, which were not dealt with in the opinion of this Court, and wherein reversible error, in our opinion, exists.

Finally, we ask that this rehearing be considered by all of the active Judges of this Circuit en banc, if, for any reason, this Panel ultimately adheres to its present position.

We believe that en banc consideration, as well as consideration by this Panel, is warranted on all of the foregoing reasons.

We especially ask the Court to reconsider its unfounded statement (Slip 2301) that Judge Carter named "two groups of five persons the evidence linked to one another". In explaining the charge (A-83; A-84; and A-92; record 1451, 1452 and 1460), he listed, that is, Judge Carter, a number of defendants without, however, stating which five allegedly included the charge involving VARIANO, or anyone else for that matter.

The Judge did nothing more than throw out a number of names and have the jury guess who the five or more might be. It is therefore obvious, as explained supra, that several jurors might very well have chosen five different people and thus there would be no unanimity as to whether the crime was committed. (See UNITED STATES v. NATELLI, supra;

and UNITED STATES v. GUTERMA, supra).

In addition, nowhere in the charge does the Court explain what the effect of dismissing the conspiracy count is or was. The Court did not tell the jury that they could not consider co-conspiratorial statements since there was no longer a conspiracy count.

In short, the Court gave no guidance at all in this very complicated and unusual situation.

The motion to dismiss the Section 1955 count and pointing up the dilemma created by the dismissal of the conspiracy charge, adequately protected the record. Thus, we do not have a situation as we had in UNITED STATES v. BONACORSA, 528 F.2d 1218 (2 Cir., 1976), where the issue was not adequately protected. (BONACORSA at 1222).

At 1451 of the record, (A-83), the Trial Court listed nine persons whose guilt or innocence had to be decided, but did not break it down with respect to "five or more persons" as required by 18 U.S.C. 1955.

CONCLUSION

The petition for rehearing should be granted and the judgment of conviction should be reversed.

Respectfully submitted,

Irving Anolik

IRVING ANOLIK,
Attorney for Defendant-Appellant
PETER VARIANO.

CERTIFICATION

I, IRVING ANOLIK, attorney for appellant Peter Variano, hereby certify that this petition for rehearing is made in good faith and not for the purpose of delay.

DATED: March 24, 1977.

Irving Anolik

ROBERT B. FISKE JR.